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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**REASONABLENESS OF BNSF
RAILWAY COMPANY COAL
DUST MITIGATION TARIFF
PROVISIONS**

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Docket No. FD 35557

**JOINT REPLY OF AMEREN ENERGY FUELS & SERVICES COMPANY;
ARIZONA ELECTRIC POWER COOPERATIVE, INC.; AUSTIN ENERGY;
CLECO CORPORATION; CPS ENERGY; ENTERGY SERVICES, INC.;
KANSAS CITY POWER & LIGHT COMPANY; LOWER COLORADO RIVER
AUTHORITY; MIDAMERICAN ENERGY COMPANY; MINNESOTA POWER;
NEBRASKA PUBLIC POWER DISTRICT; OMAHA PUBLIC POWER
DISTRICT; TEXAS MUNICIPAL POWER AGENCY; WESTERN FARMERS
ELECTRIC COOPERATIVE; WESTERN FUELS ASSOCIATION, INC.; AND
WISCONSIN PUBLIC SERVICE CORPORATION TO BNSF RAILWAY
COMPANY'S PETITION FOR SUBPOENAS**

**ENTERED
Office of Proceedings**

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**Part of
Public Record**

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Dated: February 16, 2012

Their Attorneys

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On January 27, 2012, BNSF Railway Company ("BNSF") filed a document styled "Petition for Subpoenas" ("Petition" or "Petition for Subpoenas"). BNSF's Petition asks the Surface Transportation Board ("STB" or "Board") to issue sixteen subpoenas duces tecum – one to each of the sixteen entities referenced above, each of whom is a member of the Western Coal Traffic League ("WCTL"). WCTL Members will be collectively referred to as "WCTL Member Companies" or "Members."¹

The Board should summarily deny BNSF's Petition. Issuance of subpoenas against non-parties is an extraordinary remedy in STB proceedings. Since the agency

¹ WCTL Member Companies are not parties to this proceeding and do not believe their intervention is necessary in order to reply in opposition to BNSF's Petition, but to the extent the Board believes otherwise, WCTL Member Companies move for leave to intervene under 49 C.F.R. § 1112.4 for the limited purpose of responding to BNSF's Petition.

was created in 1996, the agency has issued only a handful of subpoenas, and those were issued to fill gaps in complex rate case records. The STB has never issued a subpoena to a non-party in a declaratory order proceeding, nor has BNSF demonstrated its entitlement to the extraordinary relief it seeks.

BNSF's Petition is Step 2 in its two-step stratagem to unlawfully target and retaliate against WCTL Members because of WCTL's participation in this proceeding. WCTL is a party in this proceeding and BNSF is entitled to discovery against WCTL. However, BNSF is not entitled to discovery against WCTL's Members – who are not parties to this proceeding – either directly from WCTL which BNSF has sought via a Motion to Compel² (Step 1 in BNSF's attack plan); or through backdoor discovery against WCTL Members by invoking the Board's rarely used third-party discovery procedures (Step 2 in BNSF's attack plan).

BACKGROUND

The pertinent background facts include the following:

A. Coal Dust I

BNSF published its initial Coal Dust Tariff³ in the Spring of 2009.

Following the publication of that Tariff, WCTL sought to engage BNSF in discussions

² BNSF Railway Company's Motion to Compel Discovery from Western Coal Traffic League (filed Jan. 27, 2012) ("BNSF Motion to Compel" or "BNSF Motion").

³ "Coal Dust Tariff" refers to Item 100, entitled "Coal Dust Mitigation Requirements," initially published on April 30, 2009 in Revision 011 to BNSF's Price List 6041-B and Item 101, entitled "Coal Dust Mitigation Requirements Black Hills Sub-

concerning the Tariff but was summarily rebuffed, as were other coal shippers.⁴ In October 2009, Arkansas Electric Cooperative Corporation (“AECC”) filed a petition asking that the Board declare BNSF’s publication of the Coal Dust Tariff constituted an unreasonable practice under 49 U.S.C. § 10702(2). The subsequent proceedings before the Board were denominated Docket No. FD 35305, *Arkansas Electric Cooperative Corporation – Petition for Declaratory Order (“Coal Dust I”)*.

In its Decision served on December 1, 2009, the Board issued an order inviting all interested persons to participate as parties in the *Coal Dust I* proceedings. Many coal shippers and shipper associations accepted the Board’s invitation, including WCTL. WCTL devoted substantial time, money, and resources in *Coal Dust I*, including the submission of 378 pages of comments supported by twelve expert witness verified statements.

On March 3, 2011, the Board issued a decision finding that BNSF’s publication of the Coal Dust Tariff constituted an unreasonable practice. *Arkansas Elec. Coop. Corp. – Pet. for Decl. Order*, Docket No. FD 35305 (STB served March 3, 2011). The Board relied extensively on WCTL’s expert evidence in reaching this result (*id.* at 12-13) and urged the parties to work together to “develop reasonable solutions to the

Division,” initially published on May 27, 2009 in Revision 012 to BNSF’s Price List 6041-B.

⁴ See WCTL’s Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation, Docket No. FD 35305 (filed Aug. 11, 2011) (“WCTL Petition”) at 3.

problems presented in this case.” *Id.* at 14. BNSF ignored the Board’s admonition and proceeded to unilaterally develop and publish its Revised Coal Dust Tariff.⁵

On August 11, 2011, WCTL requested that the Board take three actions “to avoid another long, drawn-out coal dust proceeding”:⁶ reopen the *Coal Dust I* case record to address the legality of BNSF’s Revised Coal Dust Tariff; initiate a Board-supervised mediation; and stay the effective date of the Revised Coal Dust Tariff during the pendency of the Board-supervised mediation. *Id.* WCTL’s request was supported by the American Public Power Association (“APPA”), the Edison Electric Institute (“EEI”), the National Rural Electric Cooperative Association (“NRECA”), and AECC. BNSF replied in opposition to WCTL’s request, but represented for the first time in its reply that BNSF would not take any actions to enforce the Revised Coal Dust Tariff without first giving affected shippers 60 days advance notice.⁷

In its decision served on August 31, 2011, the Board denied WCTL’s request for an injunction on grounds that the request had been practically mooted by BNSF’s reply representations. *See Arkansas Elec. Coop. Corp. – Pet. for Decl. Order*, Docket No. FD 35305 (STB served Aug. 31, 2011) at 3 (“shippers face[] no current possibility of a sanction for noncompliance”). The Board subsequently determined that it

⁵ “Revised Coal Dust Tariff” refers to Item 100, entitled “Coal Dust Mitigation Requirements,” as originally published on July 20, 2011 in Revision 017 to BNSF’s Price List 6041-B, and as amended thereafter.

⁶ WCTL Petition at 2.

⁷ BNSF Railway Company’s Reply to Western Coal Traffic League’s Petition to Reopen and for Injunctive Relief Pending Board-Supervised Mediation (filed Aug. 23, 2011) at 4.

would “not order mediation at this time” (*Arkansas Elec. Coop. Corp. – Pet. for Decl. Order*, Docket No. FD 35305 (STB served Nov. 22, 2011) at 3) and instituted a new declaratory order proceeding “to address issues raised by WCTL” in its request to reopen *Coal Dust I*. *Id.* at 4 n.5. This new proceeding was denominated Docket No. FD 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions* (“*Coal Dust II*”).

B. Coal Dust II

At the joint request of BNSF and WCTL, the Board adopted an “accelerated” *Coal Dust II* procedural schedule.⁸ Pursuant to that schedule, notices of intent to participate in *Coal Dust II* as parties of record have been submitted on the shipper side by APPA, EEI, NRECA, WCTL, AECC, National Coal Transportation Association (“NCTA”) and Union Electric Company d/b/a Ameren Missouri. The other parties of record are BNSF, Union Pacific Railroad Company, and the United States Department of Transportation.

The accelerated procedural schedule also established a 50-day discovery period, which ended on February 6, 2012. On December 23, 2011, Coal Shipper Associations⁹ jointly served a single set of discovery requests on BNSF and, on January 18, 2012, Coal Shipper Associations jointly served a single set of follow-up requests. Consistent with standard Board practice, Coal Shipper Associations have not demanded

⁸ *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557 (STB served Dec. 16, 2011) at 1.

⁹ “Coal Shipper Associations” refers to APPA, EEI, NRECA, and WCTL, collectively.

that BNSF provide any information or documents that are not within BNSF's possession, custody, or control, nor have Coal Shipper Associations sought any non-party discovery.

BNSF has proceeded down a different path, seeking discovery of a scope and breadth against trade associations and non-parties never before contemplated or sanctioned in any STB proceeding. Specifically, BNSF tendered separate sets of discovery requests against all shipper parties of record, including separate sets of requests to the shipper trade association parties – APPA, EEI, NCTA, NRECA, and WCTL. In a stark departure from standard STB practice, BNSF defined each association as including the association's "members."¹⁰ Collectively, the associations have more than 3,100 individual member companies.

Each trade association, including WCTL, objected to producing member company information or documents that were not in the "possession, custody, or control" of the association.¹¹ For its part, WCTL stated that it was providing, or would provide, any specified non-privileged responsive information and documents that were in its possession, custody, and control.¹² WCTL completed its responsive production on January 30, 2012.

¹⁰ Excerpts of BNSF's discovery requests seeking Member-specific information from individual shipper associations are attached in WCTL's Reply to BNSF's Motion to Compel at Exhibit 1 (filed February 6, 2012) ("WCTL Feb. 6 Reply").

¹¹ Excerpts of the individual shipper associations' objections to BNSF's discovery requests seeking member-specific information are attached in WCTL's Feb. 6 Reply at Exhibit 2.

¹² See WCTL's Responses and Objections to BNSF Railway Company's First Set of Interrogatories and Requests for Production of Documents ("WCTL Discovery

BNSF also tendered discovery requests on each current, individual WCTL Member – sixteen sets in all – with a total of 272 separately numbered requests.¹³ BNSF’s requested non-party discovery is unprecedented in STB practice. Each WCTL Member objected individually to BNSF’s attempt to use party-based discovery against non-parties.¹⁴

C. BNSF’s Motion to Compel and BNSF’s Petition for Subpoenas

BNSF filed its Motion to Compel on January 27, 2012. BNSF’s Motion asks the Board to order WCTL to produce any information and documents that its Member Companies may possess in response to seven interrogatories and nine document production requests. *See* BNSF Motion at 1, 5.¹⁵ BNSF contends that it was not asking the Board for a similar order directed at the other association parties in this case because, BNSF opines, “WCTL is not a typical industry association” (*id.* at 8) and WCTL’s Members may possess “relevant” information. *Id.* at 6.

WCTL replied to BNSF’s Motion on February 6, 2012.¹⁶ WCTL demonstrated in its Reply that the Board had no authority under its Rules of Practice to order WCTL to produce Member information that was not within WCTL’s possession, Responses”) at 2. (A copy of the WCTL Discovery Responses is set forth in BNSF’s Motion to Compel at Exhibit 4.)

¹³ Copies of these requests are set forth in BNSF’s Motion to Compel at Exhibit 3.

¹⁴ A copy of these objections is set forth in BNSF’s Motion to Compel, Exhibit 4 at 1.

¹⁵ BNSF Interrogatory Nos. 4, 7-12, and Requests for Production (“RFP”) Nos. 1-8, 10. (These interrogatories and RFPs were reproduced in Exhibit 3 to WCTL’s Feb. 6 Reply.)

¹⁶ *See* 49 C.F.R. § 1114.31(a)(2) (reply to motion to compel due within ten days).

custody and control. *See* WCTL's Feb. 6 Reply at 7-10. WCTL also demonstrated that BNSF's Motion was a thinly veiled attempt to retaliate against WCTL's Members for WCTL's participation in this case. *Id.* at 11-14.

BNSF also filed its Petition for Subpoenas on January 27, 2012. In its Petition, BNSF requests that if the Board denies its Motion to Compel, the Board should grant its Petition by issuing sixteen subpoenas – one to each of WCTL's sixteen Member Companies. *See* BNSF Petition at 2. Each of the sixteen subpoenas contains the same nine separately numbered RFP's.¹⁷ BNSF argues that the Board should grant its Petition because, it asserts, the documents it seeks are "relevant," its RFP's are "narrowly drawn," producing the requested documents "will not be unduly burdensome" and the production is necessary to "have[] a complete record" in this proceeding. *Id.* at 1, 6.

ARGUMENT

BNSF's Petition must be summarily denied. Discovery against non-parties is an extraordinary remedy in STB proceedings, and BNSF has not come close to meeting its burden of proof in asking the Board to issue more subpoenas in this case than the Board has issued in all cases since the agency was created in 1996. Moreover, BNSF's Petition, like its Motion to Compel, is clearly part of a concerted effort by BNSF to retaliate against WCTL for participating in this case. Such abusive tactics should not be sanctioned in this, or any other, STB proceeding.

¹⁷ The nine requests are reproduced in Exhibit 1 to this Reply.

I.

ISSUANCE OF SUBPOENAS DUCES TECUM ON NON-PARTIES IS AN EXTRAORDINARY REMEDY THAT IS SELDOM GRANTED

The Board has the statutory authority to issue a subpoena duces tecum compelling non-parties to produce documents.¹⁸ However, the Board seldom exercises its authority to grant this extraordinary relief. A search reveals that the STB has issued only four subpoenas duces tecum since the agency was created in 1996, and then only for very limited purposes in stand-alone cost (“SAC”) cases.¹⁹ It also appears that in two of these cases the non-party subject to the subpoena did not oppose its issuance;²⁰ in the third, the non-party was a contractor of the defendant railroad and the defendant had

¹⁸ See 49 U.S.C. § 721(c)(1) (“Board may subpoena witnesses and records related to a proceeding of the Board”).

¹⁹ See *Wisconsin Power & Light Co. v. Union Pac. R.R.*, STB Docket No. 42051, 2000 WL 799085 at *2 (STB served June 21, 2000) (“WPL”) (directing production by a consultant, employed by the complaint shipper, to produce specified coal demand and traffic forecasts); *Pub. Serv. Co. of Colo. d/b/a Xcel Energy v. Burlington N. and Santa Fe Ry.*, STB Docket No. 42057, 2002 WL 127071 at *2 (STB served Feb. 1, 2002) (“Xcel”) (directing a contractor of the defendant railroad to produce locomotive fuel gauge data); *Arizona Pub. Serv. Co. v. Burlington N. and Santa Fe Ry.*, STB Docket No. 41185, 2003 WL 23009129 at *1 (STB served Dec. 23, 2003) (“APS”) (directing non-party utility whose traffic was included in the complainant shipper’s traffic group to produce traffic projections); *E.I. DuPont de Nemours and Co. v. Norfolk S. Ry.*, STB Docket No. 42125 at 1-2 (STB served Dec. 9, 2011) (“DuPont”) (directing corporate affiliate of the complainant shipper to produce information concerning the affiliate’s private truck fleet operations).

²⁰ See *APS*, 2003 WL 23009129 at *1; *DuPont* at 1.

refused to authorize the contractor's production of the subject documents;²¹ and in the fourth, the non-party subpoenaed was the shipper's principal expert witness.²²

Under longstanding precedent, the Board will grant a petition for a subpoena only if a "very strong foundation" is made by the moving party. *See Asphalt Supply & Serv., Inc. v. Union Pac. R.R.*, ICC Docket No. 40121, 1987 WL 98155 at *1 (ICC decided March 27, 1987) ("*Asphalt*") ("from very early in its existence the Commission has required the laying of a very strong foundation before it will use its subpoena power"). BNSF has not made any credible showing, much less a "strong" one for issuing in this case four times the number of subpoenas duces tecum than the Board has issued in all cases in the past fifteen years.

II.

BNSF HAS NOT DEMONSTRATED ITS ENTITLEMENT TO THE EXTRAORDINARY RELIEF IT SEEKS

The Board should deny BNSF's Petition because (1) BNSF RFPs seek documents BNSF does not need; (2) BNSF's RFPs are grossly overbroad; (3) responding to the RFPs will impose undue burden and expense on WCTL Members; and (4) non-party discovery is not permitted under the governing accelerated procedural schedule.

²¹ *See Xcel*, 2002 WL 127071 at *2.

²² *See WPL*, 2000 WL 799085 at *2.

A. BNSF Has Not Demonstrated a Legitimate Need for the Documents it Seeks

BNSF argues that the documents it seeks should be produced because they are “relevant” to issues raised in this case. Petition at 4. However, the Board “requires more than a minimal showing of potential relevancy” before ordering party-based discovery.²³ Instead, a party “must demonstrate a real, practical need for the information.” *Id.* These standards for obtaining party-based discovery are necessarily heightened for non-party discovery, where the moving party must “lay[] a very strong foundation” for non-party discovery. *Asphalt*, 1987 WL 98155 at *1.

BNSF has utterly failed to meet its burden of proof to obtain non-party discovery against WCTL Members. BNSF’s Petition contains no demonstration of “a real, practical need” for the documents it seeks, much less “laying a very strong foundation” for obtaining these documents. All BNSF can muster is the boilerplate assertion that the information it seeks is necessary to “complete [the] record” in this proceeding. Petition at 6.

Of course, the Board clearly can have “a complete record” in *Coal Dust II* without BNSF harassing WCTL Members via non-party discovery, as is illustrated in *Coal Dust I*. The parties had no problem developing a complete and comprehensive record without resort to non-party discovery, and the Board had no problem deciding *Coal Dust I* on the record presented. In contrast, in the SAC cases where non-party

²³ *Total Petrochemicals USA, Inc. v. CSX Transp., Inc.*, STB Docket No. 42121 (STB served Nov. 24, 2010) at 2 (internal quotations and citations omitted).

discovery has been ordered, the non-party discovery permitted was critically important to the requesting party to meet its burden of proof.²⁴

Moreover, it is readily apparent that BNSF's interest here is not in obtaining "relevant" information.²⁵ In cases of industry-wide importance like the instant case, many non-parties may possess "relevant" information, but BNSF is not seeking any non-party discovery from them in *Coal Dust II*. As is self-evident from BNSF's discovery filings, BNSF has targeted WCTL Members for non-party discovery because it believes WCTL is some type of "atypical," rogue organization which instituted the *Coal Dust II* case, and sought discovery from BNSF, so WCTL's non-party Members should suffer the consequences in the form of Board-ordered non-party discovery. *See, e.g.*, Motion to Compel at 7-10; Petition at 2-4. Retaliatory discovery of this type is clearly unlawful.²⁶

BNSF also has its facts wrong. WCTL is no different than other trade associations that frequently appear before the Board, including BNSF's trade association – the Association of American Railroads – in that it represents the interests of its members in proceedings before the Board. *See* WCTL Feb. 6 Reply at 11-13. It also is of particular ill-will for BNSF to complain about WCTL's asserted "initiat[ion]" of the

²⁴ *WPL*, 2000 WL 799085 at *2; *Xcel*, 2002 WL 127071 at *2; *APS*, 2003 WL 23009129 at *1; *DuPont* at 1.

²⁵ BNSF also seeks a substantial amount of information that clearly is not relevant to coal dust mitigation in rail cars in BNSF or UP line-haul service, including irrelevant information concerning coal dust mitigation at stationary sources. *See, e.g.*, BNSF RFP No. 7.

²⁶ *See* 49 C.F.R. § 1114.21(c) (prohibiting "oppress[ive]" discovery practices); WCTL Feb. 6 Reply at 13 n.30.

Coal Dust II proceeding. Petition at 2. The record clearly shows that WCTL asked the Board to reopen *Coal Dust I* in order to mediate the issues raised by BNSF's Revised Coal Dust Tariff. BNSF opposed mediation, which left the Board with little choice but to institute *Coal Dust II*.²⁷

B. BNSF's RFPs are Grossly Overbroad

BNSF claims that the RFPs it asks the Board to order WCTL Members to respond to are "narrowly drawn." Petition at 6. In fact, these RFPs are grossly overbroad:

- Each of BNSF's nine RFPs requests asks WCTL to provide "all documents that refer or relate" to the matters referenced in the RFP. Requests that seek "all documents" are overbroad by definition, and such requests are routinely subject to objections in STB proceedings, including by BNSF in *Coal Dust II*, as impermissibly overbroad. *See, e.g.*, BNSF Railway' Responses and Objections to Coal Shippers' First Set of Interrogatories and Document Requests (set forth in Exhibit 2 to this Reply) at 2 (Jan. 9, 2012) ("BNSF Responses") ("BNSF objects to . . . [the] Requests to the extent they seek production of or information regarding 'all documents' . . . relating to matters described in particular requests on grounds those requests are overly broad and unduly burdensome in light of the nature of this proceeding."). Thus, BNSF is asking the Board to issue a subpoena directing WCTL Members to respond to RFP's that BNSF itself concedes are impermissibly overbroad.

²⁷ WCTL also sought mediation in *Coal Dust I*, which BNSF also opposed. *See* WCTL Petition at 4.

- BNSF compounds its request seeking “all documents” by marrying these requests up with grossly overbroad topics. For example, BNSF’s RFP No. 9 asks WCTL Members to “produce all documents that refer or relate to communications between You and any Person regarding the Coal Loading Rule.” Thus, BNSF is asking the STB to order that WCTL Members produce every scrap of paper or email that relates in any way to the Revised Coal Dust Tariff over more than two years. No agency can impose such an onerous requirement on parties, much less non-parties.

- Furthermore, BNSF directs its RFPs to “You” which it defines expansively to include a company’s “employees, agents, and all others acting (or who have acted) on its behalf.” *See* BNSF Petition, Exhibit 1 (setting forth BNSF’s individual Subpoenas to each WCTL Member) at 2. Once again, BNSF is asking the Board to define the scope of production in an overbroad manner that BNSF finds objectionable when applied to BNSF production. *See* BNSF Responses at 3 (“BNSF objects to the definition of ‘BNSF’ on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to . . . [produce] documents in the possession of former employees, directors, consultants, affiliates, [and] all other persons acting (or who have acted) on BNSF’s behalf”).

- BNSF asks in several RFPs for information related to coal dust mitigation at WCTL Member plants. *See, e.g.,* RFP Nos. 7(a)-(d). These requests are also grossly overbroad and unnecessary. WCTL is already on record in this proceeding as acknowledging that “topper sprays/surfactants . . . are generally recognized to work

when applied to a large pile of coal *that is stationary*”²⁸ so there is no need for BNSF to obtain any discovery from WCTL’s non-party Members on dust mitigation at utility generating stations, other than to further harass them.

- BNSF directs its requests to WCTL Members that include UP shippers. However, for its part, BNSF objects to producing “information relating to UP trains operating on the Joint Line.” BNSF Responses at 2-3.

The vastly overbroad RFPs that BNSF requests the Board order WCTL Members to respond to stand in sharp contrast to narrowly drawn requests that the Board has ordered non-parties to respond to in SAC cases, *i.e.*, data concerning the accuracy of fuel gauges,²⁹ specific SAC traffic forecast data,³⁰ and limited trucking information.³¹ Thus, not only is BNSF asking the Board to issue more subpoenas in this case than it has before collectively in all cases, it is asking the Board to issue subpoenas whose scope vastly exceeds the scope of any subpoena ever issued before by the Board.

C. BNSF’s RFPs Intentionally Attempt to Impose Undue Burdens and Expenses on WCTL Members

BNSF argues that discovery against WCTL Members will not be burdensome. Petition at 6. This assertion is patently false. BNSF clearly seeks discovery against WCTL’s Members because BNSF knows that responding to this discovery will impose significant burdens on each of WCTL’s sixteen Members, who

²⁸ See WCTL Petition, Verified Statement of Dr. Mark J. Viz at 3 (emphasis in original).

²⁹ *Xcel*, 2002 WL 127071 at *2.

³⁰ *WPL*, 2000 WL 799085 at *2; *APS*, 2003 WL 23009129 at *1.

³¹ *DuPont* at 1.

each will have to: (i) study BNSF's requests; (ii) consult with in-house and outside counsel concerning the preparation of their responses; (iii) review their files (hard copy and electronic); (iv) copy responsive documents (if any); (v) address and resolve privilege and related issues; (vi) address and resolve confidentiality matters involving other non-parties (*e.g.*, where RFPs seek confidential contracts and related matters); (vii) classify documents as privileged, highly confidential, confidential or public; (viii) collate and bates stamp production; and (ix) address the myriad of other issues that arise with document production including disputes with BNSF. Undertaking these actions will be very time-consuming and expensive for each WCTL Member, and will add to the already significant financial outlays WCTL's Members are incurring to fund WCTL's participation in this case.

D. Non-Party Discovery is Not Permissible Under the Governing Accelerated Procedural Schedule

At the joint request of BNSF and WCTL, the Board issued a procedural schedule agreed upon by BNSF and WCTL.³² This is an "accelerated" schedule that sets a truncated 50-day discovery schedule. *Id.* The accelerated procedures WCTL and BNSF agreed to, and the Board adopted, do not contemplate or permit time-consuming non-party discovery.³³

³² *Reasonableness of BNSF Ry. Coal Dust Mitigation Tariff Provisions*, Docket No. FD 35557 (STB served December 16, 2011).

³³ *Accord Canexus Chems. Canada, L.P. v. BNSF Ry.*, STB Docket No. 42132 (STB served Feb. 2, 2012) at 4-5 (requested discovery will be denied if it is inconsistent with governing "expedited" case procedures).

Indeed, in responding to WCTL's discovery requests, BNSF repeatedly limited the scope of its responses to party-based discovery – discovery that is clearly permitted in this case – by citing the “highly compressed discovery period” and “the nature and expedited schedule of this proceeding.” *See* BNSF Responses at 2, 4, 6, 8, 13-21 (set forth in Exhibit 2 to this Reply). Time-consuming, and case-delaying, non-party discovery – discovery that has never taken place in a Board declaratory order proceeding – is completely inconsistent with “the highly compressed discovery period” in this case and “the nature and expedited schedule of this proceeding.”

CONCLUSION

BNSF's Petition is a classic example of why many shippers fear raising issues with the Board – the railroads will retaliate. The Board should emphatically reject BNSF's tactics of retaliation and summarily deny BNSF's Petition.

Respectfully submitted,

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Dated: February 16, 2012

Their Attorneys

CERTIFICATE OF SERVICE

I hereby certify that this 16th day of February, 2012, I have caused copies of the forgoing to be served via first-class mail, postage prepaid, or by more expeditious means, upon all parties of record to this proceeding.

/s/ Andrew B. Kolesar III
Andrew B. Kolesar III

Exhibit 1

REQUESTS FOR PRODUCTION

1. Please produce all documents that contain, reflect, or otherwise refer or relate to analyses performed by You or any other Person relating to the quantity of coal lost from rail cars while the coal is in transit by rail.

2. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of coal that is lost from rail cars while the coal is in transit by rail, including but not limited to documents that refer or relate to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methodologies; and
- (c) the effectiveness of such methods.

3. Please produce all documents that refer or relate to arrangements, agreements, contracts, quotes, bids, offers, or any other communications between You and any Person, including but not limited to coal mines or suppliers of coal dust suppression products or services, regarding methods that could be used at coal mines to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

4. Please produce all documents that refer or relate to Your plans to reduce the amount of coal that is lost from rail cars while the coal is in transit by rail.

5. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on employees of railroads, coal mines, coal shippers, or utilities, or on property or rail cars owned by railroads, coal mines, coal shippers, or utilities.

6. Please produce all documents that discuss, analyze, or otherwise refer or relate to the effect of coal dust suppression products or services on the generation of power at particular power generating facilities or at power generating facilities in general.

7. Please produce all documents that discuss, analyze, or otherwise refer or relate to methods for reducing the amount of coal or coal dust that is lost during handling or storage of coal, including handling or storage of coal at stockpiles at power generating facilities, including but not limited to:

- (a) the costs of such methods;
- (b) any comparisons of the costs of such methods with the costs of alternative methodologies;
- (c) the effectiveness of such methods; and

- (d) the impact such methods have on the generation of power at particular power generating facilities or at power generating facilities in general.

8. Please produce all minutes, reports, agendas, summaries, or other documents referring or relating to meetings or conferences, including meetings of WCTL committees or subcommittees, at which the subject of coal that is lost from rail cars while the coal is in transit by rail was discussed.

9. Please produce all documents that refer or relate to communications between You and any Person regarding the Coal Loading Rule.

Exhibit 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35557

**REASONABLENESS OF BNSF RAILWAY COMPANY
COAL DUST MITIGATION TARIFF PROVISIONS**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS
TO COAL SHIPPERS' FIRST SET OF INTERROGATORIES
AND DOCUMENT REQUESTS**

Pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, Defendant BNSF Railway Company ("BNSF") hereby responds and objects to the First Set of Interrogatories and Document Requests served by Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association (collectively "Coal Shippers") on December 23, 2011 ("Coal Shippers' First Set of Requests").

GENERAL OBJECTIONS

The following general objections are made with respect to Coal Shippers' First Set of Requests.

1. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek documents that contain information that is confidential, commercially sensitive, or proprietary, including sensitive nonpublic information relating to third parties, that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.
2. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of

privilege or other protection.

3. BNSF objects to Coal Shippers' First Set of Requests to the extent the requests seek information or documents relating to issues previously resolved by the Board in *Arkansas Electric Cooperative Cooperation—Petition for Declaratory Order*, STB Finance Docket 35305 (STB served Mar. 3, 2011). Such issues are not within the scope of the Board's proceeding in *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Nov. 22, 2011).

4. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek production of or information regarding "all documents," "all pricing authorities," "all analyses," and "all communications" relating to matters described in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF will conduct a search for responsive information as indicated in its response to specific requests that is commensurate with the nature and expedited schedule of this proceeding.

5. BNSF objects to Coal Shippers' First Set of Requests to the extent they request BNSF to complete its production in advance of the close of discovery as set out in the Surface Transportation Board's decision entering the procedural schedule in this proceeding.

6. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek information relating to BNSF's internal management cost data on grounds that such requests seek highly sensitive information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to such requests on grounds that they are beyond the scope of permissible discovery.

7. BNSF objects to Coal Shippers' First Set of Requests to the extent they seek

information relating to UP trains operating on the Joint Line.

OBJECTIONS TO DEFINITIONS

The following objections to definitions are made with respect to Coal Shippers' First Set of Requests.

1. BNSF objects to the definition of "Analyses" as vague to the extent it includes "other types of written, printed, or electronic submissions of information."

2. BNSF objects to the definition of "BNSF" on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires the production of information or documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, affiliates, all other persons acting (or who have acted) on BNSF's behalf, and "any contractors retained to perform services in connection with coal transportation services relating to the coal movements affected by this proceeding." Subject to this objection, BNSF will produce responsive, non-privileged documents that are reasonably available from its two primary coal dust consulting firms, Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"), that relate to the principal consulting activities that those firms performed for BNSF.

3. BNSF objects to the definitions of "document," "related," "related to," and "relating to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control.

OBJECTIONS TO INSTRUCTIONS

The following objections to instructions are made with respect to Coal Shippers' First Set of Requests.

1. BNSF objects to Coal Shippers' First Set of Requests, including Instruction Number 2, on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires BNSF to provide detailed information or descriptions about data produced in computer-readable format. BNSF further objects to Instruction Number 2 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it seeks computer programs and intermediate files used in deriving responsive data. BNSF further objects to Instruction Number 2 to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.
2. BNSF objects to Instruction Number 3 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable Coal Shippers to assess the grounds for the withholding of a document.
3. BNSF objects to Instruction Number 5 to the extent it goes beyond the duty to supplement set out in 49 C.F.R. § 1114.29 on grounds that it goes beyond the scope of permissible discovery.
4. BNSF objects to Instruction Number 6 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.
5. BNSF objects to Instruction Number 7 on grounds that it is overly broad, unduly

burdensome, and beyond the scope of permissible discovery.

6. BNSF objects to Instruction Number 8 on grounds that overly broad, unduly burdensome, and beyond the scope of permissible discovery.

7. BNSF objects to Coal Shippers' First Set of Requests, including Instruction Number 11, to the extent they seek information created before November 1, 2009, on grounds that such requests are overly broad and unduly burdensome in that they seek information that has already been the subject of discovery in *Arkansas Electric Cooperative Cooperation—Petition for Declaratory Order*, STB Finance Docket 35305 (STB served Mar. 3, 2011).

BNSF incorporates these General Objections, Objections to Definitions, and Objections to Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Please describe the enforcement measures BNSF has implemented, or plans to implement, or has considered, if a shipper subject to the Assailed Tariff Item does not comply with the provisions set forth in the Assailed Tariff Item.

BNSF's Response: BNSF objects to Interrogatory Number 1 to the extent it seeks information that is protected from disclosure by the attorney-client privilege, the work product doctrine, or any other privilege. Subject to and without waiving its specific and general objections, BNSF states that it has not implemented specific enforcement measures for shippers that are not in compliance with the provisions of Item 100, and Appendices A and B thereto, of BNSF's Coal Rules publication denominated as Price List 6041-B ("BNSF's Coal Loading Rule") and that no formal non-privileged consideration has been given to the implementation of specific enforcement measures.

BNSF further states that the majority of coal that BNSF transports from the Powder River Basin ("PRB") is transported under confidential contracts with each individual shipper. The

provisions of those contracts are the result of private negotiations between BNSF and individual shippers. The Board does not have jurisdiction over the enforcement of coal dust remediation provisions in contracts with individual shippers. As to BNSF's common carrier shippers, BNSF expects that its shippers will take good faith measures to comply with BNSF's Coal Loading Rule and at this time there is no need for specific enforcement measures. If, contrary to BNSF's expectations, it should become necessary to take enforcement action with respect to one or more individual common carrier shippers, BNSF will provide 60 days' advance notice before implementing any enforcement action, which would allow any affected common carrier shipper to seek Board intervention if it chooses to do so.

Interrogatory No. 2:

Please describe all communications between BNSF and UP concerning coal dust mitigation including communications relating to: (a) the Assailed Tariff Item; (b) the "Joint Line operating rule" referenced at page 8 of the Bobb Statement; and (c) Items 215 and/or 216 in UP Circular 6603-C.

BNSF's Response: BNSF objects to Interrogatory Number 2 to the extent it seeks "all communications between BNSF and UP concerning coal dust mitigation" on grounds that such a request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials and will produce such materials, if any, from which information responsive to this Interrogatory can be obtained relating to (a) BNSF's Coal Loading Rule; (b) the "Joint Line operating rule;" and (c) Items 215 and/or 216 in UP Circular 6603-C.

Interrogatory No. 3:

Please describe the enforcement measures BNSF has implemented, or plans to implement, or has considered, relating to UP if a UP Train does not comply with the "Joint Line operating rule" referenced at page 8 of the Bobb Statement.

BNSF's Response: BNSF objects to Interrogatory Number 3 on grounds that it incorrectly assumes BNSF's Coal Loading Rule is addressed to whether a train is in compliance with the rule. BNSF's Coal Loading Rule does not address compliance by individual trains but whether shippers take measures to limit the release of coal dust from all loaded cars. See BNSF's Response to Interrogatory No. 5. Subject to and without waiving its specific and general objections, BNSF states that it has not implemented specific enforcement measures relating to UP and that no formal non-privileged consideration has been given to the implementation of specific enforcement measures relating to UP.

Interrogatory No. 4:

Please describe the enforcement measures BNSF has implemented, or plans to implement, or has considered relating to a shipper whose coal is moving in a UP Train if the UP Train does not comply with the "Joint Line operating rule" referenced at page 8 of the Bobb Statement.

BNSF's Response: BNSF objects to Interrogatory Number 4 on grounds that it incorrectly assumes BNSF's Coal Loading Rule is addressed to whether a train is in compliance with the rule. BNSF's Coal Loading Rule does not address compliance by individual trains but whether shippers take measures to limit the release of coal dust from all loaded cars. See BNSF's Response to Interrogatory No. 5. Subject to and without waiving its specific and general objections, BNSF states that it has not implemented specific enforcement measures relating to UP and that no formal non-privileged consideration has been given to the implementation of specific enforcement measures relating to UP.

Interrogatory No. 5:

Please describe how BNSF is, or plans to, determine whether a train is in compliance with paragraph 2 of the Assailed Tariff Item if the train is: (a) not treated with "an acceptable topper agent" as provided under paragraph 3 of the Assailed Tariff Item; and (b) no "other method of coal dust suppression" approved by BNSF as provided in paragraph 4 of the Assailed Tariff Item is applied to the train.

BNSF's Response: BNSF objects to Interrogatory Number 5 on the grounds that it incorrectly assumes that paragraph 2 of BNSF's Coal Loading Rule is addressed to "whether a train is in compliance with" the rule. Paragraph 2 refers to "take measures to load coal" so as to limit "loss in transit of coal dust from coal cars." BNSF's Coal Loading Rule does not address compliance by individual trains but whether shippers take measures to limit the release of coal dust from all loaded cars, and to that end it requires shippers to "provide BNSF with written notice of compliance efforts." Shippers that do not undertake good faith efforts to limit the release of coal dust from loaded cars that are consistent with the provisions of paragraphs 3 or 4 of BNSF's Coal Loading Rule would not be in compliance with the rule.

Interrogatory No. 6:

Please describe what "adverse[] impact[s]" BNSF is referring to in the last sentence of paragraph 4 in the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that the last sentence of paragraph 4 in BNSF's Coal Loading Rule refers to adverse impacts on BNSF's employees, property, locomotives, or owned cars.

Interrogatory No. 7:

Please describe all topper testing of Wyoming- or Montana-origin coal trains that BNSF is aware of, including but not limited to, the "recent tests carried out in the PRB" referenced in paragraph 3.B. of the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding and will produce responsive, non-privileged materials from which information responsive to this Interrogatory can be obtained relating to BNSF's topper testing of Wyoming- or Montana-origin coal trains that BNSF conducted during 2010 and 2011.

Interrogatory No. 8:

For the "recent tests carried out in the PRB" referenced in paragraph 3.B. of the Assailed Tariff Item, please describe:

- (a) the cut point used in the passive collectors to distinguish between the smaller particles that would exit the collectors and the larger particles that would drop into the devices' collector boxes;
- (b) any wind-tunnel studies performed with regard to the design of the passive collectors;
- (c) all steps taken to substantiate that all of the material collected in the passive collectors actually was coal;
- (d) all testing, calculations, or other engineering data establishing that the concentration of particulate matter in the entrained air flow sampled by the passive collectors was the same as the concentration in the entire air flow over the top of a railcar equipped with a passive collector;
- (e) all equipment used to perform field measurements of sample mass;
- (f) whether the methods involved regular calibration traceable to a NIST standard;
- (g) the degree of precision associated with field measurements of sample mass;
- (h) the estimate of error associated field measurements of sample mass;
- (i) the field procedures for sample handling and measurement;
- (j) the collector cleaning procedures;
- (k) the procedures for conditioning passive collector samples;
- (l) the procedures followed to determine which railcars would be equipped with passive collectors;
- (m) the manner, if any, in which data from BNSF's Rail Transport Emission Profiling System was used to supplement and/or normalize the passive collector data; and
- (n) any statistical analyses concerning the passive collector tests.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that it is in the process of assembling a response to Interrogatory Number 8 and will furnish the response when it is available.

Interrogatory No. 9:

If BNSF contends that it should not bear any costs associated with compliance with the Assailed Tariff Item, please describe the bases for this contention.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that it does not contend that "it should not bear any costs associated with compliance" with BNSF's Coal Loading Rule. In fact, BNSF has incurred substantial costs regarding the development of the rule and will continue to incur costs associated with compliance with the

rule. BNSF further states as to its shippers for whom BNSF transports coal under confidential contracts, the terms of each contract is a matter of private negotiation between BNSF and each individual shipper. BNSF further states that common carrier shippers normally bear the costs of complying with loading and operating rules for their shipments.

Interrogatory No. 10:

Please describe how BNSF is, or plans to, determine a train's compliance with the profiling requirements set forth in paragraph 3.A. of the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that laser-based equipment called the Coal Car Load Profiling System ("CCLPS") monitors compliance with the load profile requirements of BNSF's Coal Loading Rule on loaded coal cars. BNSF further states that it will produce documents from which additional non-privileged information sought in Interrogatory Number 10 can be obtained to the extent such documents are reasonably available.

Interrogatory No. 11:

For each individual TSM E-Sampler device located along the Joint Line or the Black Hills Subdivision, please identify: (a) the precise location of the device (including both the specific milepost and a precise description of the location of the device relative to the track); (b) the serial number of the device (or other coding used by BNSF for purposes of identification); and (c) the date of installation of the device in its present location.

BNSF's Response: BNSF objects to Interrogatory Number 11 on grounds that the request seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and is beyond the scope of permissible discovery in this proceeding.

Interrogatory No. 12:

If BNSF intends to use TSM E-Samplers in any way to measure train compliance with the standards set forth in the Assailed Tariff Item, please describe how compliance will be measured.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that it does not intend to use TSM E-Samplers to determine compliance with BNSF's Coal Loading Rule. See BNSF's Response to Interrogatory No. 5. However, BNSF will use TSM E-Samplers and other mechanisms or procedures as a diagnostic tool to assess BNSF's coal dust mitigation efforts.

Interrogatory No. 13:

If BNSF intends to use devices other than TSM E-Samplers in any way to measure train compliance with the Assailed Tariff Item, please identify the devices and describe how compliance will be measured

BNSF's Response: Subject to and without waiving its general objections, BNSF states that it does not currently intend to use devices other than the CCLPS equipment described in its response to Interrogatory Number 10 to monitor compliance with BNSF's Coal Loading Rule. As noted above in BNSF's response to Interrogatory Number 13, BNSF intends to use TSM E-Samplers and other mechanisms or procedures as a diagnostic tool to assess BNSF's coal dust mitigation efforts.

Interrogatory No. 14:

Please describe why BNSF selected the "85 percent" reduction standard referenced in paragraph 2 of the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that an 85 percent reduction in coal dust lost from loaded coal cars in transit will substantially reduce coal dust along PRB rail lines. In addition, tests have shown that an 85 percent reduction in coal dust losses from loaded coal trains in transit is achievable through a combination of proper load profiling and the application of appropriate topper agents.

Interrogatory No. 15:

Please describe why BNSF selected the "85%" reduction standard referenced in paragraph 3.B. of the Assailed Tariff Item.

BNSF's Response: See BNSF's response to Interrogatory Number 14.

Interrogatory No. 16:

Please identify the percentage by which profiling in accordance with paragraph 3.A. of the Assailed Tariff Item reduces coal dust emissions from loaded coal cars as compared to loss in transit of coal dust from coal cars where no remedial measures have been taken.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials and will produce such materials, if any, from which information responsive to this Interrogatory can be obtained.

Interrogatory No. 17:

Please identify, by name, title and address, the person(s) who prepared each answer to these Interrogatories and who reviewed and selected the documents to be produced in response to each of the following Requests for Production of Documents.

BNSF's Response: BNSF objects to this Interrogatory to the extent it requests the names of persons that reviewed and selected documents to be produced in response to particular document requests on grounds that such a request is beyond the scope of permissible discovery and seeks information that is protected from disclosure by the attorney-client privilege and the work product doctrine. Subject to and without waiving its specific and general objections, BNSF states that William VanHook, AVP, Chief Engineer, Systems, Maintenance and Planning, and members of the BNSF Law Department, were responsible for preparing the answers to the Interrogatories, with assistance in some instances from E. Daniel Carré, Assistant Director – Environment & Energy Division, Simpson Weather Associates.

RESPONSES AND OBJECTIONS TO REQUESTS FOR PRODUCTION

Request for Production No. 1:

Please produce all documents relating to the enforcement measures BNSF has implemented, or plans to implement, or has considered, if a shipper subject to the Assailed Tariff Item does not comply with the provisions set forth in the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF will

conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 2:

Please produce the "Joint Line operating rule" referenced at page 8 of the Bobb Statement.

BNSF's Response: Subject to and without waiving its general objections, BNSF will produce responsive, non-privileged materials.

Request for Production No. 3:

Please produce all documents containing communications between BNSF and UP concerning coal dust mitigation including communications relating to: (a) the Assailed Tariff Item; (b) the "Joint Line operating rule" referenced at page 8 of the Bobb Statement; and (c) Items 215 and/or 216 in UP Circular 6603-C.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all documents concerning communications between BNSF and UP concerning coal dust mitigation" on grounds that such a request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any, relating to (a) BNSF's Coal Loading Rule; (b) the "Joint Line operating rule;" and (c) Items 215 and/or 216 in UP Circular 6603-C.

Request for Production No. 4:

Please produce all documents concerning the enforcement measures BNSF has implemented, or plans to implement, or has considered, relating to UP if a UP Train does not comply with the "Joint Line operating rule" referenced at page 8 of the Bobb Statement.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 5:

Please produce all documents concerning the enforcement measures BNSF has implemented, or plans to implement, or has considered relating to a shipper whose coal is moving in a UP Train if the UP Train does not comply with the "Joint Line operating rule" referenced at page 8 of the Bobb Statement.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 6:

Please produce all pricing authorities (including contracts) containing coal dust mitigation provisions applicable to coal originating in Wyoming and Montana.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all pricing authorities (including contracts) . . ." on grounds that the request for such information is overly broad and unduly burdensome. BNSF further objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding. If the Board enters an order requiring the production of confidential contract information, BNSF will produce the coal dust mitigation provisions contained in confidential contracts after providing notice to affected shippers.

Request for Production No. 7:

Please produce all documents relating to how BNSF is, or plans to, determine whether a train is in compliance with paragraph 2 of the Assailed Tariff Item if the train is: (a) not treated with "an acceptable topper agent" as provided under paragraph 3 of the Assailed Tariff Item; and (b) no "other method of coal dust suppression" approved by BNSF as provided in paragraph 4 of the Assailed Tariff Item is applied to the train.

BNSF's Response: BNSF objects to this Request on the grounds that it incorrectly assumes that paragraph 2 of BNSF's Coal Loading Rule is addressed to "whether a train is in compliance with" the rule. Paragraph 2 refers to "measures to load coal" so as to limit "loss in transit of coal dust from coal cars." BNSF's Coal Loading Rule does not address compliance by individual trains but whether shippers take measures to limit the release of coal dust from all loaded cars, and to that end it requires shippers to "provide BNSF with written notice of compliance efforts." Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 8:

Please produce all documents relating to the "adverse[] impact[s]" BNSF is referring to in the last sentence of paragraph 4 of the Assailed Tariff Item.

BNSF's Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 9:

Please produce all analyses of coal dust emissions from coal cars.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses" relating to the release of coal dust from coal cars on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 10:

Please produce all documents relating to topper testing of Wyoming- or Montana-origin coal trains that BNSF is aware of, including but not limited to, the “recent tests carried out in the PRB” referenced in paragraph 3.B. of the Assailed Tariff Item.

BNSF’s Response: BNSF objects to this Request to the extent it seeks “all documents” relating to topper testing on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks information regarding topper tests that were not conducted by BNSF on grounds that such information is not in BNSF’s possession, custody, or control. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 11:

Please produce all analyses relating to costs to comply with the Assailed Tariff Item.

BNSF’s Response: BNSF objects to this Request to the extent it seeks documents relating to “costs to comply” with BNSF’s Coal Loading Rule on grounds that it is vague and unclear. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 12:

Please produce all documents relating to how BNSF is determining, or how BNSF plans to determine, a train’s compliance with the profiling requirements set forth in paragraph 3.A. of the Assailed Tariff Item.

BNSF’s Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 13:

Please produce all analyses relating to the impact of the Assailed Tariff Item on BNSF's costs of rail service.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses relating to the impact" of BNSF's Coal Loading Rule on its costs of rail service on the grounds that the request is vague and unclear. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 14:

Please produce all documents relating to communications BNSF has had with coal shippers concerning the Assailed Tariff Item.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all documents relating to communications BNSF has had with coal shippers" regarding BNSF's Coal Loading Rule on grounds that the request for such information is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks shipper-specific or movement-specific information on grounds that such information is commercially sensitive information relating to third parties that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding. If the Board enters an order requiring the production of documents relating to communications with contract shippers relating to BNSF's Coal Loading Rule, BNSF will produce the responsive, non-privileged materials, if any, after providing notice to affected shippers.

Request for Production No. 15:

Please produce all documents relating to communications BNSF has had: (a) with surfactant suppliers; and (b) with suppliers of any other method of coal dust suppression.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all documents relating to communications BNSF has had" on grounds that such a request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and subject to any applicable notice provisions, BNSF will produce such materials, if any.

Request for Production No. 16:

Please produce all documents relating to communications BNSF has had with coal suppliers relating to the Assailed Tariff Item.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all documents relating to communications BNSF has had" on grounds that such a request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and subject to any applicable notice provisions, BNSF will produce such materials, if any.

Request for Production No. 17:

If BNSF intends to use TSM E-Samplers in any way to measure train compliance with the standards set forth in the Assailed Tariff Item, please provide all analyses relating to the TSM E-Samplers, including all computer programs used to manipulate or otherwise analyze TSM E-Sampler output.

BNSF's Response: Subject to and without waiving its general objections, BNSF states that it does not intend to use TSM E-Samplers to determine compliance with BNSF's Coal Loading Rule. *See* BNSF's Response to Interrogatory Nos. 5 and 12.

Request for Production No. 18:

If BNSF intends to use devices other than TSM E-Samplers in any way to measure train compliance with the Assailed Tariff Item, please provide all analyses relating to the devices, including all computer programs used to manipulate or otherwise analyze the devices' output.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses" relating to devices other than TSM E-Samplers on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on grounds that it is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it seeks computer programs, intermediate files, and other proprietary information used in deriving responsive data. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged, and non-proprietary materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any, sufficient to show how the CCLPS works.

Request for Production No. 19:

Please produce all analyses related to BNSF's selection of the "85 percent" reduction standard referenced in paragraph 2 of the Assailed Tariff Item.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses" relating to BNSF's selection of the "85 percent" reduction standard on grounds that the Request

is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 20:

Please produce all analyses related to BNSF's selection of the "85%" reduction standard referenced in paragraph 3.B. of the Assailed Tariff Item.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses" relating to BNSF's selection of the "85 percent" reduction standard on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 21:

Please produce all analyses relating to reduction in coal dust attributable to the profiling referenced in paragraph 3.A. of the Assailed Tariff Item.

BNSF's Response: BNSF objects to this Request to the extent it seeks "all analyses" relating to reduction in coal dust attributable to the profiling referenced in paragraph 3.A of BNSF's Coal Loading Rule on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 22:

Please produce the “[g]uidelines” referenced in paragraph 3.B. of the Assailed Tariff Item.

BNSF’s Response: Subject to and without waiving its general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding, and BNSF will produce such materials, if any.

Request for Production No. 23:

Please produce all documents relating to the “risk to the integrity of the PRB rail infrastructure” referenced at page 18 of BNSF’s Reply.

BNSF’s Response: BNSF objects to this Request to the extent it seeks “all documents” relating to the risk to the integrity of the PRB rail infrastructure on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on grounds that it seek information or documents relating to issues previously resolved by the Board in *Arkansas Electric Cooperative Cooperation—Petition for Declaratory Order*, STB Finance Docket 35305 (STB served Mar. 3, 2011). Such issues are not within the scope of the Board’s proceeding in *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*, STB Finance Docket No. 35557 (STB served Nov. 22, 2011).

Request for Production No. 24:

Please produce all documents identified in BNSF’s answers to Coal Shippers’ Interrogatories, above.

BNSF’s Response: Subject to and without waiving its general objections, BNSF will produce responsive, non-privileged materials as indicated in its responses to Interrogatory Numbers 1 through 11.

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Dated: January 9, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2012, I caused a copy of the foregoing to be served by e-mail and first-class mail, postage prepaid, upon all parties of record in this case as follows:

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